

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT MARTINSBURG**

**CHRISTOPHER HESS,
Petitioner,**

v.

**Civil Action No. 3:05CV14
Criminal Action No. 3:04CR03
(BROADWATER)**

**UNITED STATES OF AMERICA,
Respondent.**

ORDER ADOPTING REPORT AND RECOMMENDATION

On this day the above styled case came before the Court for consideration of the Report and Recommendation of Magistrate Judge James E. Seibert, dated March 14, 2006 and the Petitioner's objections thereto filed on March 27, 2006. In the interests of justice and in accordance with 28 U.S.C. § 636(b)(1), the Court has conducted a *de novo* review.

The Court, after reviewing the above, is of the opinion that the Magistrate Judge's Report and Recommendation should be and is hereby **ORDERED** adopted. Petitioner objects to the Magistrate's finding that Booker and Hughes should not be applied retroactively to cases on collateral review. United States v. Booker, 1543 U.S. 220 (2005); United States v. Hughes, 401 F.3d 540, 546 (4th Cir.2005). Petitioner argues that the holdings should be applied to his case. The Court finds that the decision in Booker should not be applied retroactively, for the reasons stated in the Magistrate's Report and Recommendation. The Court further notes, that because Hess' sentence was based on admitted facts alleged in the indictment, within the statutory range, and there is no showing of actual prejudice due to the sentencing guideline's mandatory application, the Petitioner would not be entitled to relief under Booker if that decision's holdings were applied to this case.

The Court, therefore, **ORDERS** that the Petitioner's Motion Under 28 U.S.C. §2255

to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody, be **DENIED WITH PREJUDICE** based on the reasons set forth in the Magistrate Judge's Report and Recommendation, and **STRICKEN** from the active docket of this Court.

It is so **ORDERED**.

The Clerk is directed to transmit true copies of this Order to the petitioner and all counsel of record herein.

DATED this 4th day of May 2006.


W. CRAIG BROADWATER
UNITED STATES DISTRICT JUDGE